

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20054

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In the Matter of )  
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Implementation of Sections )  
of the Cable Television Consumer )  
Protection and Competition Act )  
of 1992; Rate Regulation )

MM Docket 92-266  
MM Docket 93-215

TO: The Commission - Mail Stop 1170

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**COMMENTS OF CBA IN SUPPORT OF PETITION FOR RECONSIDERATION**

1. The Community Broadcasters Association ("CBA") hereby supports the Petition for Reconsideration filed by Engle Broadcasting W08CC ("Engle") in this proceeding, which urges the Commission to provide positive financial incentives for cable operators to carry low power television ("LPTV") stations under its "going forward" cable rate regulation rules.<sup>1/</sup> By providing greater financial incentives to carry non-local cable programming services than locally programmed LPTV stations, the going forward rules as they now stand run counter to the express Congressional finding in the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act") that "cable operators should be encouraged to carry low power television stations licensed to communities served by those systems where the low power station creates and broadcasts, as a substantial part of its programming day, local programming."

<sup>1/</sup> These Comments are timely filed, pursuant to the Commission's Public Notice, "Addendum to Report 2051," released February 15, 1995, and published at 60 Fed Reg. 10082 (Feb. 23, 1995).

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2. CBA is the trade association for the LPTV industry and represents the interests of that industry in regulatory and other forums. As of January 31, 1995, according to Commission statistics released March 8, 1995, there are 1613 licensed UHF and VHF LPTV stations across the United States, as opposed to 1527 licensed UHF and VHF full power television stations. There are more licensed LPTV stations than licensed full power television stations, demonstrating the strong presence of LPTV in American communities. Because LPTV stations primarily serve local interests in their community of license and often provide local programming, it serves the public interest to ensure that these stations are carried on cable systems in a nation where well over sixty percent of the households subscribe to cable service.

3. As the Commission is well aware, a significant portion of the nation's LPTV stations do not enjoy the same cable must-carry rights as full power stations, largely because the Cable Act restricts must-carry rights to MSA's below the top 160. Thus while cable carriage is the difference between life and death for most LPTV stations, many must struggle to make their way on to cable by a method other than the normal method for full power stations.

4. Leased channel access is one way to gain access, but experience has shown that cable companies are in no hurry to lease channel space at realistic or affordable rates. The Commission's leased channel access rules do not ensure access at

affordable rates, even though the purpose of leased access is to promote competition in the delivery of diverse programming sources.<sup>2/</sup> Recent petitions for relief illustrate that cable operators are reluctant to carry LPTV stations if not required to do so under the must-carry rules, and they will generally do so only if unreasonably high leased access rates are paid. For example, in Harry Tootle d/b/a Tootlevision v. Community Cable TV/Prime Cable of Nevada et al., DA 95-238, File No. CSR-4129-L (CS Bur., rel. Feb. 16, 1995), in the absence of must-carry rights, the cable operator demanded \$85,000 per month for a leased channel, a sum well beyond the means of the LPTV operator and beyond what the LPTV station could expect to recoup in advertising revenues as the result of being carried on cable.<sup>3/</sup>

5. The only other way to gain access to cable is to convince the cable operator that carriage of the additional service is in its own best financial interest. The going forward rules are intended to provide that financial incentive. If a new channel is added to a Cable Programming Service Tier ("CPST"), these rules permit an increase in subscriber rates of 20 cents per channel for up to six channels added on or before December 31, 1996, and another 20 cents for a seventh channel added after

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<sup>2/</sup> CBA filed a petition for reconsideration of the Commission's leased channel access rate rules on June 21, 1993.

<sup>3/</sup> In some instances, cable operators are uncooperative altogether and have to be forced to come to the table to justify their leased access rates. TV-24 Sarasota, Inc., DA 94-1563/5164, (CS Bur., rel. Dec. 27, 1994).

December 31, 1996, but no later than December 31, 1997, for a total increase of \$1.40.

6. However, if signals are added to the Basic Service Tier ("BST"), any rate increase is subject to approval of the local franchising authority and is limited to an amount ranging from one cent to 52 cents per channel. The higher range is reached only if the system has very few channels,<sup>4/</sup> and most systems may raise rates by only a few pennies when they add channels to the BST. In other words, the financial incentive to add services to the CPST is much greater than the incentive to add services to the BST.

7. Engle correctly points out that the Cable Act favors the carriage of LPTV stations. However, because Section 623(b)(7)(A)(iii) of the Communications Act defines the "basic service tier" as including "[a]ny signal of any television broadcast station...[exceptions omitted]," there is a question as to whether LPTV stations may be added to a CPST tier, even if both the cable operator and LPTV licensee want that to happen. If LPTV stations may not be added to a CPST tier, then cable operators may not take advantage of CPST financial incentives by adding LPTV's, no matter how much the public would benefit from such additions. Thus the intention of Congress to encourage cable distribution of locally programmed LPTV stations is being thwarted.

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<sup>4/</sup> The 52-cent increase applies only to systems with seven or fewer channels. It is unusual for a cable system to be that small.

8. CBA supports Engle's argument that whatever financial incentives are made available to cable operators to add services, the maximum incentive should apply to the addition of an LPTV station, especially if the station broadcasts locally produced programming.<sup>5/</sup> There are two basic ways to accomplish that result. One is by holding that the term "television broadcast station" in Section 623(b)(7)(A)(iii) of the Communications Act is intended to apply only to stations that may elect between must-carry and retransmission consent and not to those LPTV stations that by statute have no must-carry rights. Under that approach, a cable operator would be free to add an LPTV station to a CPST and enjoy the benefit of a 20-cent rate increase.<sup>6/</sup> A alternative approach would allow a cable operator who adds an LPTV station to the BST to implement a 20-cent increase that is otherwise available only for the CPST.<sup>7/</sup> Either approach would accomplish the basic objective, which is to harmonize the going forward rules with the intent of Congress to promote cable distribution of local LPTV programming.

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<sup>5/</sup> The broadcast of local programming is not a content-based test, as it involves only the place where programming produced, not the content of the programming. Locally-produced broadcast programming has been favored in the regulatory process throughout the history of broadcasting.

<sup>6/</sup> This approach has the added benefit of permitting cable systems to add LPTV stations even though they may not have room to do so on their BST.

<sup>7/</sup> This increase could be subject to local franchise authority approval, and it could apply to the addition of any television station, full or low power, with a local programming requirement if desired.

9. LPTV stations provide truly alternative services to those provided by full power stations, because their lower cost structure enables them to serve audiences that cannot economically support full power stations. These services should be nurtured, and cable operators should be rewarded for bringing them to their subscribers. The going forward rules should be amended on reconsideration to accomplish that result.

Respectfully submitted,

  
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March 10, 1995

# **CERTIFICATE OF SERVICE**

I, Laura A. Campbell, do hereby certify that I have, this 10th day of March, 1995, caused to be sent by first class United States mail, postage prepaid (by hand delivery to FCC Staff), a copy of the foregoing "Comments of CBA in Support of Petition for Reconsideration" to the following:

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